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Rosli bin Yusof v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(M)-226–10 OF 2019(P)
ZAWAWI SALLEH, NALLINI PATHMANATHAN AND MARY LIM FCJJ
25 JUNE 2021

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Criminal Procedure — Prosecution — Witnesses — Whether prosecution had duty to make available to defence witnesses who had been investigated by police and from whom statements had been recorded to ensure accused had fair trial — Whether duty was not on accused to prove his innocence or to call a particular D *witness to support his defence — Whether burden was always on prosecution to prove accused's guilt beyond reasonable doubt — Whether prosecution's discretion to call any witness it chose was subject to limitation that: (a) it had to be exercised with due regard to considerations of fairness and good faith; and (b) witnesses who had been investigated by police and from whom statements had been recorded must* E *be offered to the defence*

The Court of Appeal had upheld the High Court's decision to convict the appellant and sentence him to death on a charge of trafficking in 112,892g of cannabis. According to the prosecution's evidence, the drugs were found by F police in the boot of a car ('the car') the appellant was found to be in when he was arrested at a rest area off a highway. The appellant's defence was that the car and the drugs were not his. He also denied any knowledge of the drugs being in the car. He said the car was earlier driven by another person ('Kamarul Hisham') who had hurriedly left the scene immediately before the police G arrived and arrested the appellant. The appellant said when he was taken to the police lock-up following his arrest he saw Kamarul Hisham and a Thai national (whom Kamarul Hisham had met with earlier) also in the same lock-up. The appellant later learnt that Kamarul Hisham and the Thai national ('Yeap') dealt in illicit drugs and had used the car to transport the drugs. At the appellant's H trial, the prosecution did not call Kamarul Hisham or Yeap to testify, nor were they offered to the defence. The statements recorded from them by police were also not served on the defence pursuant to s 51A of the Criminal Procedure Code. In the instant appeal against his conviction and sentence, the appellant sought a ruling from the court that the prosecution was duty-bound to make I available to him witnesses who had been investigated by the police and from whom statements had been recorded in connection with his case and who were not called by the prosecution to testify. The appellant also sought a ruling as to what consequences should follow the prosecution's failure to adhere to such a duty. The appellant said the prosecution's failure to call Kamarul Hisham and

Yeap to testify, or to make them available to him denied him of a fair trial and the opportunity to present his case in the best manner possible with a view to securing an acquittal. The prosecution, on the other hand, argued that it had no duty as alleged by the appellant but rather the discretion whether or not it should have called Kamarul Hisham and Yeap to testify at the trial.

Held, unanimously allowing the appeal, setting aside the appellant's conviction and sentence, reducing the charge against him to one of possession under s 6 of the Dangerous Drugs Act 1952 and sentencing him to 18 years' jail and ten strokes of the rotan:

(1) The nub of the appellant's argument was not the prosecution's failure to call as its witnesses relevant persons who were arrested but its failure to make them available to the defence. No explanation was given by the prosecution for that failure (see para 37).

(2) While it was settled law that the prosecution had the discretion to call any particular witness, the discretion was subject to the limitations that: (a) it had to be exercised with due regard to considerations of fairness and good faith; and (b) the witnesses who had been investigated by the police and from whom statements were recorded must be offered to the defence (see para 38).

(3) In the present case, the importance to the defence of the witnesses in question was clearly demonstrated from the appellant's evidence that Kamarul Hisham was the person who had full control of the car in which the impugned drugs were found. The appellant had also testified that Kamarul Hisham had earlier engaged in a discussion with the Thai national, Yeap. The investigating officer ('SP8') had testified that the impugned drugs originated from Thailand. The objective of a fair trial required the prosecution to have called, at the very least, Kamarul Hisham and Yeap as witnesses unless there was some good reason not to. The prosecution did not explain why it did not call them to testify. They were persons who were arrested contemporaneously or in proximity to the appellant's arrest and pursuant to the same investigations (see paras 39–40).

(4) The notes of proceedings confirmed that following the appellant's arrest, police arrested four others including Kamarul Hisham and Yeap, in connection with the same investigations and that statements had been recorded from all of them after which SP8 had submitted a single set of investigation papers to the deputy public prosecutor who then decided not to charge them. In the circumstances, the prosecution could not be heard to say that it did not know what evidence those witnesses would have given because statements had been recorded from them. The prosecution should have made them available to the defence at the trial (see paras 42–43).

(5) The courts below seriously misdirected themselves by placing the burden on the appellant to call the witnesses mentioned to establish his defence. It was not the appellant's duty to prove his innocence or to call a particular witness to support his defence; rather the burden was on the prosecution to prove the appellant's guilt beyond reasonable doubt (see paras 44–45).

(6) A person's right to defend himself/herself against a criminal charge included the right to obtain and adduce evidence in support of his or her defence. It was desirable in the interests of justice for the defence to obtain the fullest possible access to the facts relevant to the issue in the case. In this regard, the prosecution had a duty to make available to the defence witnesses who had been investigated by the police and from whom statements had been recorded. This was an important or vital corollary or element to an accused's right to a fair trial (see para 46).

(7) Having examined the evidence in its entirety, this was a fit and proper case for the charge against the appellant to be reduced from trafficking to possession under s 6 and punishable under s 39A(2) of the Dangerous Drugs Act 1952. After hearing the submissions of the parties, the appellant was sentenced to 18 years' jail with effect from the date of his arrest and ten strokes of the cane (see paras 48–49).

[Bahasa Malaysia summary

Mahkamah Rayuan telah mengekalkan keputusan Mahkamah Tinggi untuk mensabitkan perayu dan menjatuhkan hukuman mati untuk satu pertuduhan mengedar 112,892g ganja. Menurut keternagan pendakwaan, dadah ditemui oleh pihak polis dalam satu bonet kenderaan ('kereta tersebut') yang mana perayu didapati berada di dalam kenderaan tersebut apabila dia ditahan dikawasan rehat di satu lebuhraya. Pembelaan defendan adalah bahawa kenderaan dan dadah tersebut bukan miliknya. Dia menafikan mempunyai apa-apa pengetahuan tentang dadah yang berada di dalam kereta tersebut. Dia mengatakan bahawa kereta tersebut dipanduk oleh seorang lagi individu ('Kamarul Hisham') yang telah meninggalkan tempat kejadian dengan segera sebelum polis tiba dan menahan perayu. Perayu mengatakan bahawa dia telah dibawa ke lokap polis selepas ditangkap dan dia nampak Kamarul Hisham dan seorang warganegara Thai (yang Kamarul Hisham telah berjumpa sebelum itu) juga dalam lokap yang sama. Perayu kemudiannya mengetahui bahawa Kamarul Hisham dan warganegara Thai (Yeap) tersebut mengedar dadah dan telah menggunakan kereta tersebut untuk mengangkut dadah. Sewaktu perbicaraan perayu, pendakwaan tidak memanggil Kamarul Hisham atau Yeap untuk memberi keterangan, dan mereka juga tidak ditawarkan kepada pihak pembelaan. Rakaman percakapan mereka oleh pihak polis juga tidak diserahkan kepada pihak pembaelaan selaras dengan s 51A Kanun Tatacara Jenayah. Dalam rayuan ini, tehadap sabitan dan hukumannya, perayu ingin mendapatkan satu dapatan daripada mahkamah bahawa pendakwaan

mempunyai tanggungjawab untuk memberi akses kepadanya saksi yang telah disiasat oleh pihak polis dan daripada mana rakaman percakapan yang dirakam berkaitan dengan kesnya dan yang tidak dipanggil oleh pihak pendakwaan untuk memberi keterangan. Perayu juga memohon satu dapatan bahawa apa kesan yang akan berlaku sekiranya pendakwaan gagal untuk memenuhi tanggungjawab tersebut. Perayu mengatakan bahawa kegagalan pendakwaan untuk memanggil Kamarul Hisham dan Yeap untuk memberi keterangan, atau untuk memberikan perayu akses kepada mereka menafikannya satu perbicaraan yang adil dan peluang untuk mengemukakan kesnya sebaik mungkin dengan tujuan untuk mendapatkan satu pembebasan. Pendakwaan sebaliknya menghujahkan bahawa mereka tiada tanggungjawab sepertimana yang dikatakan oleh perayu akan tetapi budi bicara sama ada mereka sepatutnya memanggil Kamarul Hisham dan Yeap untuk memberi keterangan di perbicaraan.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan sabitan dan hukuman perayu, mengurangkan pertuduhan terhadapnya kepada milikan dibawah s 6 Akta Dadah Berbahaya 1952 dan menghukumnya dengan 18 tahun pemenjaraan dan sepuluh sebatan rotan:

(1) Tunjang hujahan perayu bukanlah kegagalan pihak pendakwaan untuk menaggil saksinya yang merupakan orang yang relevan kyang ditahan tetapi kegagalan mereka untuk membolehkan pihak pembelaan akses kepada mereka. Tiada penjelasan diberikan oleh pihak pendakwaan untuk kegagalan tersebut (lihat perenggan 37).

(2) Manakala ianya merupakan undang-undang mantap bahawa pihak pendakwaan mempunyai budi bicara untuk memanggil mana-mana saksi, budi bicara tersebut mempunyai had iaitu: (a) ianya perlu dilaksanakan dengan pemberiaan keadilan dan niat baik; dan (b) saksi yang telah disiasat oleh pihak polis dan daripada mana pengataan telah dirakam daripada mereka mesti ditawarkan kepada pihak pembelaan (lihat perenggan 38).

(3) Dalam kes ini, ianya penting kepada pembelaan berkaitan dengan saksi berkaitan yang jelas ditunjukkan dari keterangan perayu dan Kamarul Hisham merupakan orang yang mempunyai kawalan penuh kereta tersebut yang mana dadah tersebut ditemui. Perayu juga memberi keterangan bahawa Kamarul Hisham telah bersembang dengan warganegara Thai, Yeap. Pegawai penyiasat (SP8) telah memberi keterangan bahawa dadah tersebut berasal dari Thailand. Matlamat satu perbicaraan adil memerlukan pendakwaan untuk memanggil, atau sekurang-kurangnya, Kamarul Hisham dan Yeap sebagai saksi kecuali wujud sebab yang baik untuk tidak berbuat sedemikian. Pendakwaan tidak menjelaskan mengapa mereka tidak dipanggil untuk memberikan keterangan. Mereka merupakan individu yang ditahan pada masa yang

sama atau berdekatan dengan tahanan perayu dan berdasarkan siasatan yang sama (lihat perenggan 39–40).

(4) Nota prosiding mengesahkan bahawa selepas tangkapam perayu, polis menahan empat orang lain, termasuk Kamarul Hisham dan Yeap, berkaitan dengan siasatan yang sama dan pengataan mereka telah dirakam yang mana SP8 telah menyerahkan satu set kertas siasatan kepada timbalan pendakwa raya yang kemudiannya membuat keputusan untuk tidak menuduh mereka. Dalam keadaan ini, mengambil kira pengataan telah dirakam daripada mereka, pendakwaan sepatutunya menawarkan mereka kepada pihak pembelaan sewaktu perbicaraan (lihat perenggan 42–43).

(5) Mahkamah terdahulu terkhilaf apabila meletakkan beban pada pihak perayu untuk memanggil saksi yang dinyatakan untuk membuktikan pembelaannya. Ianya bukan tanggungjawab perayu untuk membuktikan ketidakbersalahannya atau memanggil mana-mana saksi untuk menyokong pembelaannya; akan tetapi beban dipihak pendakwaan untuk membuktikan kebersalahan perayu melampaui sebarang keraguan munasabah (lihat perenggan 44–45).

(6) Hak seseorang untuk membela dirinya terhadap satu pertuduhan jenayah adalah termasuk hak untuk mendapatkan dan mengemukakan keterangan untuk menyokong pembelaannya. Ianya adalah dikehendaki dalam kepentingan keadilan untuk pembelaan mendapatkan akses sepenuh yang mungkin kepada fakta yang relevan kepada isu dalam kes. Dalam hal ini, pihak pendakwaan mempunyai tanggungjawab untuk menawarkan kepada pihak pembelaan saksi yang telah disiasat oleh pihak polis dan daripada mereka yang keterangan telah dirakam. Perkara ini adalah penting atau korolari penting atau elemen kepada hak seorang tertuduh kepada perbicaraan yang adil (lihat perenggan 46).

(7) Setelah meneliti keseluruhan keterangan, ini merupakan satu kes yang sesuai untuk tertuduh terhadap perayu dikurangkan daripada pengedaran kepada milikan dibawah s 6 yang dihukum dibawah s 39A(2) Akta Dadah Berbahaya 1952. Selepas mendengar hujahan pihak-pihak, perayu dihukum dengan 188 tahun pemenjaraan berkuatkuasa dari tarikh tangkapan dan sepuluh sebatan rotan (lihat perenggan 48–49).]

Cases referred to

Abd Latif Sakimin v PP [2009] MLJU 1828, FC (refd)

Adel Muhammed El Dabbah v Attorney-General of Palestine [1944] 2 All ER 139; [1944] AC 156, PC (refd)

Dato' Seri Anwar bin Ibrahim v PP [2010] 2 MLJ 312; [2010] 4 AMR 292, FC (refd)

Dyers v R (2002) 210 CLR 285; [2002] HCA 45, HC (refd)

Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
Mraz v R (1955) 93 CLR 493, HC (refd)
Muhammad bin Kadar and another v PP [2011] 3 SLR 1205, CA (refd)
Pendakwa Raya lwn Klong K'Djoanh [2016] MLJU 1644; [2016] 5 CLJ 533, CA (refd)
PP v Mohd Fazil bin Awaludin [2009] 7 MLJ 741, HC (refd)
R v Banks [1916] 2 KB 621 (refd)
R v Guerin (1931) 23 Cr App Rep 39 (refd)
R v Bryant (1946) 31 Cr App Rep 146 (refd)
R v Manning [2017] QCA 23, SC (refd)
R v Sugarman (1935) 25 Cr App Rep 109 (refd)
Richardson v R (1974) 131 CLR 116, HC (refd)
Sandra Margaret Birch v PP [1978] 1 MLJ 72 (refd)
Tan Foo Su v PP [1967] 2 MLJ 19 (refd)
Teh Lee Tong v Rex [1956] 1 MLJ 194 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433; [1995] 3 CLJ 1, SC (refd)

Legislation referred to

Criminal Procedure Code ss 51A, 180(1)
Dangerous Drugs Act 1952 ss 6, 37(da), 39A(2), 39B(1)(a)
Federal Constitution art 5(1)

Simon Murali (Kok Yuen Lin with him) (Simon Murali & Co) for the appellant.
Abdul Ghaffar bin Ab Latif (Nurul Farhana Khalid with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zawawi Salleh FCJ (delivering judgment of the court):

INTRODUCTION

[1] The central issue in this appeal concerns the duty of the prosecution to make available to the defence any witness whose evidence may assist the accused in his or her defence. Specifically, the appellant asks this court to determine the following questions of law:

(a) whether the prosecution has a duty to make available to the defence witnesses who had been investigated by the police and from whom statements had been recorded; and

(b) if there is such duty, what are the consequences of the failure of the prosecution to uphold this duty.

[2] The charge against the appellant reads as follows:

> Bahawa kamu pada 6 Disember 2014, jam lebih kurang 10.20 malam di Hentian Juru Selatan, Juru, di dalam Daerah Seberang Perai Tengah, dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya jenis 'Cannabis' seberat 112,892 gram.

A Oleh itu, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B (2) Akta yang sama.

FACTS

B

[3] The events giving rise to this appeal took place on 6 December 2014 at about 10.20pm at Hentian Juru Selatan, Seberang Perai Tengah, Pulau Pinang, where the appellant was arrested by the police inside a car, Toyota Avanza ('the car'). At the time of the arrest, the car was locked from inside and the engine C was still running.

[4] The police had conducted an inspection of the car boot and found five white gunny sacks containing 25 packed cannabis and one remaining gunny sack containing 19 packed cannabis ('impugned drugs'). The impugned drugs D were seized and handed over to the investigating officer (SP8).

[5] SP8 sent the seized items to the Chemistry Department for analysis and the chemist (SP6) confirmed that the seized items were cannabis weighing E 112,892g.

[6] In the course of the trial, SP8 confirmed that there were four individuals whom the police arrested and investigated subsequent to the arrest of the appellant ('arrestees'). The names of the four arrestees are:

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(a) Sahrolnizam bin Mat Yusof;

(b) Muhamad Kamarul Hisham bin Mohd Jilani;

(c) Mohd Fitri bin Andullah; and

G (d) a Thai national by the name of Yap Tab San.

(Please refer to pp 363–365, *rekod rayuan Jld* 3(2)).

[7] It is pertinent to note that after closing its case, the prosecution did not H offer these arrestees/witnesses to the defence. The police also did not serve their statements to the defence pursuant to s 51A of the Criminal Procedure Code ('the CPC'). The names of these witnesses do not appear in the prosecution list of witnesses (see 'Lampiran A — Senarai Saksi Pendakwaan', at p 39, *rekod rayuan*, *Jld* 3(2)).

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[8] At the end of the prosecution's case, the learned trial judge found that the prosecution had succeeded in establishing a prima facie case against the appellant and the appellant was ordered to enter his defence.

[9] The crux of the appellant's defence was that one Muhamad Kamarul Hisham bin Mohd Jilani ('Kamarul Hisham') was the actual person who at all material times had full control of the car in which the impugned drugs were found. The car was driven by Kamarul Hisham and the appellant denied he had any knowledge of the impugned drugs found in the boot of the car.

[10] The appellant had set out the fact pattern on which he sought to rely in support of his defence. According to the appellant, on 6 December 2014, he followed Kamarul Hisham to a house in Taiping to pick up the car. They went together in a car, a Proton Persona, driven by Kamarul Hisham. Upon arrival at the house, Kamarul Hisham met a lady at the house while the appellant waited outside the gate.

[11] After a brief conversation, Kamarul Hisham gave a piece of paper to the lady and then drove the car out from the lady's house. Thereafter, both of them headed to Kedah; Kamarul Hisham drove the Toyota Avanza car while the appellant was at the wheels of the Proton Persona.

[12] At a location in Kedah, they met a Thai national named Yeap Tak San with whom Kamarul Hisham had a conversation but the appellant was not privy to this conversation. Thereafter, they headed back south where both drove the respective vehicles as mentioned.

[13] They stopped by at a petrol station at Sungai Dua along the southbound PLUS Highway. Then, Kamarul Hisham left the car at the station and took a ride with the appellant in the Proton Persona after which they had meals near a shopping area. Thereafter, the appellant drove back towards Sungai Dua together with Kamarul Hisham, who then requested him to stop at a KFC outlet. The appellant dropped him at the KFC outlet. Kamarul Hisham then picked up the car which happened to be nearby. Both of them drove the respective vehicles out of Sungai Dua and headed south.

[14] Kamarul Hisham then told the appellant that he would meet him at the Juru Rest Area before proceeding further. The appellant obliged and drove the Proton Persona to a parking lot at the Juru Rest Area. He switched off the engine and waited for Kamarul Hisham for a while.

[15] Kamarul Hisham then drove to Juru Rest Area and parked the car beside the Proton Persona with the engine still running. Kamarul Hisham then appeared anxious and without saying much grabbed the keys of the Proton Persona from the appellant's hand, got in and drove off speedily.

[16] The appellant was puzzled by the strange conduct of Kamarul Hisham. Within moments, a car came at the side where the appellant was standing, from

which a group of individuals in plain-clothes appeared. They informed him that they were police and wanted to know what was inside the car. The appellant told them that the driver of the car was his friend, Kamarul Hisham.

[17] As we have alluded to earlier, the car was inspected by the police officers, who then found some rice gunny sacks containing plastic packets in the boot. The appellant fervently denied any knowledge about the plastic packets. The police then arrested the appellant. The appellant later came across both Kamarul Hisham and the Thai national in the police lock-up where they were all remanded. The appellant came to know from the conversation he had with them that Kamarul Hisham and the Thai national were dealing in drugs and the car was used as the vehicle for the crime.

[18] At the end of the case, the learned trial judge found that the appellant had failed to cast a reasonable doubt on the prosecution's case and had also failed to rebut the statutory presumption of trafficking under s 37(da) of the DDA 1952. Consequently, the appellant was convicted and sentenced to death.

[19] Dissatisfied with the decision, the appellant appealed to Court of Appeal. The Court of Appeal dismissed the appeal and affirmed the conviction and sentence rendered by the trial judge.

[20] The appellant appealed to this court. Hence, this appeal before us.

PARTIES' COMPETING SUBMISSIONS

[21] In essence, learned counsel for the appellant submitted that the prosecution has a duty to make available to the defence all the witnesses who had been investigated and from whom statements had been recorded. This duty assumes crucial significance whenever the prosecution decides not to call these witnesses to support its case. Learned counsel informed the court that in practice the prosecution exercises this duty by offering such witnesses to the defence after the close of its case and before the trial court hears submissions on whether a prima facie case has been established under s 180(1) of the CPC.

[22] In support of his submission, reliance was placed on the English Court Criminal Appeal case of *R v Bryant* (1946) 31 Cr App Rep 146, where the court recognises that the prosecution has a duty to make a person who can give material evidence available to defence if they decide not to call him.

[23] Learned counsel also referred us to the pre-Merdeka case of *Teh Lee Tong v Rex* [1956] 1 MLJ 194 where the court held that all witnesses whose statements have been taken should be brought to court by the prosecution,

except those whose evidence will clearly and obviously throw no light on the case; and any witness not so brought to court must be made available to the accused should he desire to call such witness.

[24] The appellant relied heavily on the decision of this court in *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; [1995] 3 CLJ 1 where in the course of his judgment, Edgar Joseph Jr FCJ cited with approval passages from the Australian case of *Richardson v R* (1974) 131 CLR 116, where the relevant excerpt reads (at p 6):

> ... Secondly, there is room for some debate as to what is meant by the opening words of the statement and it should not be read as inhibiting the discretion which the prosecutor has not to call in the Crown case any eye-witness if he judges that there is sufficient reason for not calling him, as, for example, where he concludes that the witness is not a credible and truthful witness. *In this event the prosecutor will ensure that the accused is given the opportunity to call the witness*. (See also *Lim Young Sien v Public Prosecutor* [1994] 2 SLR 257).

[25] Based on the authorities cited above, learned counsel posited that it is a well-entrenched principle that the prosecution has an inviolable duty under the law to make available and offer to the defence all the witnesses from whom statements have been taken and whom it decides not to call to testify before the court.

[26] Learned counsel further submitted that the consequence of the prosecution's failure to make available these witnesses to the defence is a denial of the appellant's right to a fair trial and the appellant had been deprived an opportunity to present his case in the best manner as possible with a view to securing an acquittal (see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 (FC)).

[27] In reply, learned deputy public prosecutor informed the court that the correct fact was that Kamarul Hisham and the other three arrestees were arrested and further investigated under IP No 1768 and not under Bukit Merah Report No 12992/14, the arrest report of the appellant (see the evidence of SP8 at pp 355–356, *rekod rayuan Jld* 3(2)). Learned deputy argued that there was no necessity for the prosecution to include these names under the List of witnesses (*senarai saksi pendakwaan*) due to the fact that the appellant was alone at the time of his arrest in Juru Rest Area. Insofar as Kamarul Hisham is concerned, he was apprehended at a different place ie at Tol Changkat Jering and also at a different time.

[28] Learned deputy further submitted that the High Court and the Court of Appeal were correct in holding that the failure to call the arrestees as witnesses for the prosecution was not fatal to the prosecution's case. The High

Court and the Court of Appeal recognised the prosecutorial discretion on the calling of witnesses and there was no evidence on record showing that the prosecution had attempted to suppress the facts from the court by not calling these witnesses or that the appellant indeed had been prejudiced as a result of the non-calling of these witnesses (see *Abd Latif Sakimin v Public Prosecutor* [2009] MLJU 1828; *Pendakwa Raya lwn Klong K'Djoanh* [2016] MLJU 1644; [2016] 5 CLJ 533).

OUR ANALYSIS AND FINDINGS

[29] We begin with the discussion on the proper role of the prosecutor. The prosecutor in a criminal trial occupies a special position. His or her role is unlike the counsel for a party in a civil trial or counsel for the accused. Unlike other clients who have interest in securing a conviction at all costs, prosecutors are often called 'minister of justice' and their role is to present the whole case to the court and assist the court in finding out where the truth lies. Due to their special role in criminal trials, the prosecutors are under several well-defined duties including: (i) duty of disclosure (see s 51A of the CPC); (ii) duty to call all credible and relevant witnesses; and (iii) duty to conduct the case fairly (see *R v Banks* [1916] 2 KB 621; *R v Sugarman* (1935) 25 Cr App Rep 109; *Muhammad bin Kadar and another v Public Prosecutor* [2011] 3 SLR 1205).

[30] We would like to emphasise that, at all times, prosecutors are expected to present their case fairly, impartially and professionally and assist the court in arriving at the truth by producing all the relevant facts to the court as 'Officer of the Court' (see *R v Guerin* (1931) 23 Cr App Rep 39).

[31] In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 2 MLJ 312; [2010] 4 AMR 292 (FC), this court observed at (p 331 (MLJ); p 310 (AMR)):

> The right to a fair trial is of course a universal principle. It is inviolable.

The same case quoted with approval a passage from the judgment of Mohd Zawawi Salleh JC (now FCJ) in *Public Prosecutor v Mohd Fazil bin Awaludin* [2009] 7 MLJ 741, which reads:

> The principle of a fair trial is sacrosanct in all civilized legal jurisdictions. It is a principle of universal application. In Malaysia, the principle of fair trial and fairness have been long established and recognized in several decisions.

[32] In *Lee Kwan Woh v Public Prosecutor* the court quoted a passage from the judgment of Wilfred Kelsham Fullagar J in the Australian case of *Mraz v R* (1955) 93 CLR 493, which reads at p 649:

> ... every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed.

> *If there is any failure in any of these respects, and the appellant may* thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. (Emphasis added.).

[33] The right to a fair trial is implied in art 5(1) of the Federal Constitution. In *Lee Kwan Woh v Public Prosecutor*, the court stated:

> Article 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within reasonable time by an impartial Court established by law ...

[34] We accept the submission advanced by learned deputy that the prosecution is solely responsible for deciding how to present its case and choosing which witnesses to call. The dictum of Lord Thankerton in the case of *Adel Muhammed El Dabbah v Attorney-General of Palestine* [1944] 2 All ER 139; [1944] AC 156 at pp 168–169 that 'the court will not interfere with the exercise of that discretion, unless, perhaps it can be shown that the prosecutor has been influenced by some oblique motives' has been followed and accepted by our courts. Having said that, we hasten to add that the discretion is not unfettered. The prosecution must exercise his or her power to choose which witness to call consistent with the requirement of fairness. He or she is under a duty to call all credible witnesses whose evidence is essential to fully presenting the narrative of the case. The obligation to call witnesses is sometimes expressed in terms of prosecution's duty to call 'material witnesses'. In this context, 'material' has a wide meaning and evidence which is admissible and capable of influencing the court's assessment of guilt or otherwise is capable of being material (see *Dyers v R* (2002) 210 CLR 285; [2002] HCA 45 at [11]); *R v Manning* [2017] QCA 23 at [19]. Unless there is a good reason for not calling the witnesses, prosecutors should call all eye-witnesses to the events constituting the alleged offence.

[35] We do not wish to lay down any rules to fetter the prosecution's discretion on a matter such as this which is so dependent on the particular circumstances of each case. However, generally speaking, we say the prosecution does not need to call a witness if his or her evidence:

(a) is likely to be unreliable, untrustworthy or otherwise incapable of belief;

(b) is likely to be unnecessarily repetitions in light of the number of witnesses available for the proof of the matter on which they would give evidence; and

(c) relates to an issue which has been raised by the defence and on which the defence bears the onus of proof.

[36] The above examples are not meant to be exhaustive, but merely a general guide.

[37] We now turn to the mainstream of the present appeal. The nub of learned counsel's argument is not about the failure of the prosecution to call these arrestees as its witnesses but the critical issue is the failure of the prosecution to make them available to the defence. No explanation was proffered by prosecution on this failure.

[38] In our view, it is settled law based on the authorities cited to us by the learned counsel for the appellant in his submission that the prosecution has discretion whether to call any particular witness, but such discretion is subject to two limitations, vis: (a) the discretion must be exercised with due regard to considerations of fairness and good faith; and (b) the witnesses who had been investigated by the police and from whom the statements have been recorded must be offered to the defence.

[39] On the factual matrix of the present appeal, the importance of these witnesses to the defence is clearly demonstrated from the evidence of the appellant, who averred that the said Kamarul Hisham was the actual person who has full control of the car in which the impugned drugs were found. The appellant testified that it was Kamarul Hisham who engaged in a discussion with the Thai national, Yeap Tak San. The investigating officer ('SP8') herself confirmed that the impugned drugs originated from Thailand as can be seen from the rice gunny sacks in which the impugned drugs were found. SP8's evidence during re-examination reads:

> SP8: Semasa siasatan dijalankan, mendapati dadah tersebut dari Thailand tetapi saya tidak mendapat maklumat yang terperinci tentang tarikh dan masa dadah tersebut dibawa masuk ke dalam Malaysia, YA.

[40] In our view, the objective of a fair trial requires the prosecutor to call the arrestees or at the very least Kamarul Hisham and the Thai national as witnesses unless there is some good reason not to do. The prosecution did not proffer any explanation for the non-calling of these witnesses. These witnesses are persons who had been arrested contemporaneous or in proximity to the arrest of the appellant and pursuant to the same investigation.

[41] SP8 confirmed that there were other arrests made subsequent to the arrest of the appellant. The notes of proceedings at pp 361–365 of *rekod rayuan*, *Jld* 3(2) reveals the following:

> Maanveer Singh: Insp Pada Tarikh sebelum ini iaitu pada 4/1/2018 Insp telah memberi keterangan di mahkamah dan Insp telah memberitahu bahawa terdapat tangkapan-tangkapan lain bersangkut kes ini. Insp ingat tak berapa orang yang ditangkap selain Rosli?

SP8: 4 orang, YA.

Maanveer Singh: So campur dengan Rosli, 5 orang?

SP8: 5 orang, YA.

Maanveer Singh: Untuk kes ini Insp IO kan?

SP8: Benar, YA.

Maanveer Singh: Dan untuk kes ini Insp ada beritahu bahawa seorang warga Thailand juga telah ditahan, betul?

SP8: Benar, YA

Maanveer Singh: Dan Insp ada siasat dadah yang telah dirampas berasal dari mana?

SP8: Berdasarkan siasatan kes ini menunjukkan dadah tersebut daripada Negara Thailand.

Maanveer Singh: Dan untuk kes ini seorang warga Thailand ditangkap?

SP8: Untuk makluman YA untuk kes bersangkut Bukit Tengah 12992/14 tiada tangkapan lelaki Thailand tetapi tangkapan lelaki Thailand adalah report lain yang bersangkut dengan kes ini.

Maanveer Singh: IP 1 kan?

SP8: IP satu saja.

[42] The notes of proceedings at p 377 clearly confirmed that the statements of all the arrestees had been taken by SP8. The relevant part of p 377 is reproduced as hereunder:

Manveer Singh: Insp ada ambil keterangan-keterangan kesemua empat orang yang ditahan. Setuju?

SP8: Setuju, YA.

[43] The investigating officer had investigated all these witnesses and submitted the single set of investigation papers to the deputy public prosecutor who then decided not to charge them. In the circumstances, the prosecution cannot be heard to say that it did not know what evidence these witnesses would give because statements had been recorded from them. Necessary arrangements should have been made by the prosecution to make them available to the defence during the proceedings in the High Court.

[44] We agree with the submission of the learned counsel for the appellant that the learned trial judge and the Court of Appeal had committed serious misdirection in placing the burden on the appellant to call these witnesses to establish his defence that Kamarul Hisham was the actual trafficker and the failure to do so was a decisive factor in the assessment of the defence case.

[45] It is trite law that it is not the duty of the appellant to prove his innocence or to call a particular witness to support his defence (see *Tan Foo Su*

v Public Prosecutor [1967] 2 MLJ 19; *Sandra Margaret Birch v Public Prosecutor* [1978] 1 MLJ 72). The law places upon the prosecution the burden to prove guilt of the appellant beyond reasonable doubt and not on the appellant to prove his innocence. Well-entrenched in jurisprudence is the rule that the conviction of the appellant must rest not on the weakness of the defence but on the strength of the prosecution. This principle is the corner stone of our criminal law.

[46] Before parting, we consider it apposite to emphasise that a person's right to defend himself or herself against a criminal charge includes the right to obtain and adduce other evidence in support of his or her defence. It is desirable in the interest of justice for the defence to obtain the fullest possible access to the facts relevant to the issue in the case. In this regard, the prosecution has a duty to make available to the defence witnesses who had been investigated by the police and from whom the statements have been recorded. This is, as we alluded to earlier, an important or vital corollary or element of an accused's right to a fair trial.

[47] For all those reasons, we allowed the appellant's appeal and set aside the conviction and sentence under s 39B(1)(a) of the DDA 1952.

[48] Having examined the evidence in its entirety, we are of the considered opinion that this is a fit and proper case for us to reduce the charge against the appellant from s 39B(1)(a) of the DDA to one of possession under s 6 and punishable under s 39A(2) of the DDA 1952.

[49] After considering the mitigating factors submitted by learned counsel and the aggravating factors advanced by learned deputy, we sentence the appellant to 18 years of imprisonment with effect from the date of his arrest (6 December 2014) and ten strokes of cane.

Order accordingly.

Reported by Ashok Kumar